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FIMBANK PLC v. PEMILIK DAN/ATAU PENCARTER DEMIS KAPAL ATAU VESEL "NIKA" KINI DIKENALI SEBAGAI "BAO LAI"

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COURT OF APPEAL, PUTRAJAYA
AZIZAH NAWAWI JCA
HADHARIAH SYED ISMAIL JCA
AHMAD ZAIDI IBRAHIM JCA
[CIVIL APPEAL NO: W-02(IM)(ADM)-1031-06-2022]
14 JUNE 2023

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Abstract – *Order 6 r. 7(2) of the Rules of Court 2012, the specific provision that deals with the renewal of admiralty writ in rem, only allows a maximum of five renewals.*

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CIVIL PROCEDURE: *Admiralty – Action in rem – Application to extend validity of writ – Writ remained unserved as vessel had not been into Malaysian waters since writ was issued for service to be effected – Five applications to extend validity of writ made and court granted five extensions – Whether sixth extension ought to be granted – Rules of Court 2012, O. 3 r. 5, O. 6 r. 7 & O. 92 r. 4*

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The appellant was a Maltese bank and a trade financier while the respondent was the former owner of the vessel 'NIKA'. The appellant filed a writ in action *in rem* at the High Court against 'The owners and/or Demise Charterers of the Ship or Vessel 'Nika', claiming for misdelivery of the cargo by the respondent to the authorised third parties without presentation of the original bills of lading which, at all material times, were in the appellant's possession. Until now, the writ in this case remained unserved as the vessel had not been into Malaysian waters since the writ was issued in May 2019 for service to be effected. Prior to this, the appellant had made five applications to extend the validity of the writ to which the court had granted five extensions. By notice of application, the appellant applied under O. 6 r. 7, O. 3 r. 5 and O. 92 r. 4 of the Rules of Court 2012 ('ROC') to extend the validity of the writ for a further six months. The Judicial Commissioner ('JC') dismissed the appellant's application on the grounds that: (i) Order 6 r. 7(2) of the ROC was a specific provision to cater for renewal of admiralty *in rem* and it only allowed a maximum of five renewals; (ii) Order 92 r. 4 of the ROC was not applicable as there was no *lacuna* in the rules to necessitate the court to exercise its inherent jurisdiction; (iii) the Rules Committee had seen it fit to permit only five times of extensions of writs *in rem*; (iv) the Rules Committee had not seen it fit to amend the Rules of Court notwithstanding developments in the procedural rules of other jurisdictions; and (v) the court should not usurp the power and function of the Rules Committee. Hence, the present appeal.

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Held (dismissing appeal)
Per Hadhariah Syed Ismail JCA delivering the judgment of the court:

(1) The JC had applied his mind correctly to O. 6 r. 7(2) of the ROC which limited renewal of a writ in admiralty action to five times only and therefore, the court was not allowed to grant the sixth renewal. In view of the specific provisions with regard to the number of renewals allowed under O. 6 r. 7(2) of the ROC, there was no *lacuna* in the provision of the rules with regard to the renewal of the writ in admiralty action. The JC did not err in refusing to apply O. 92 r. 4 of the ROC as there was a specific provision on the renewal of the writ in admiralty action under O. 6 r. 7(2). Added to that, the JC was not plainly wrong on the interpretation of O. 6 r. 7(2) of the ROC on the ground that if the court granted the sixth renewal, when would the renewal stop if the vessel still did not come into Malaysian waters four years from now? Does it mean that the court should continue granting extensions until the vessel comes into Malaysian waters? If these were to happen, it would defeat the purpose of having O. 6 r. 7(2) of the ROC. (paras 26-28)

Case(s) referred to:
Arab-Malaysian Credit Bhd v. Tan Seang Meng [1995] 1 CLJ 773 CA ***(refd)***
Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal [2009] 4 CLJ 329 FC ***(refd)***
Samsung Corp v. Chinese Chamber Realty Pte Ltd [2004] 1 SLR (R) 382 ***(refd)***
Yomeishu Seizo Co Ltd & Ors v. Sinma Medical Products (M) Sdn Bhd [1996] 2 BLJ 142 HC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 3 r. 5, O. 6 rr. 7(1), (2), (2A), O. 70 rr. 7(1), 10, O. 92 r. 4

For the appellant - Arun Krishnalingam; M/s Christopher & Lee Ong

[Editor's note: For the High Court judgment, please see FIMBank Plc v. The Owners And/Or Demise Charterers Of The Ship Or Vessel "NIKA" Now Known As "Bao Lai" [2022] 8 CLJ 324 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Hadhariah Syed Ismail JCA:

Introduction

[1] The appeal by the appellant (plaintiff) is against the decision of the High Court given on 12 May 2022, dismissing the appellant's notice of application (encl. 46) to extend the validity of the writ *in rem* for the sixth time.

[2] This appeal raised the issue of whether the court can extend the validity of an admiralty writ *in rem* beyond the fifth time as prescribed under O. 6 r. 7(2) of the Rules of Court 2012.

[3] We heard and dismissed the appeal on 15 November 2022.

Brief Facts

[4] The appellant, Fimbank Plc, is a Maltese bank and a trade financier. The respondent is the former owner of the vessel "NIKA".

[5] On 17 May 2019, the appellant filed a writ in action *in rem* against "the owners and/or demise charterers of the ship or vessel "NIKA". The writ is endorsed with the following claims:

> The plaintiffs (appellant herein), as persons entitled to immediate possession of and/or having other legal or equitable interests in and/or having rights of suit in respect of a cargo of approximately 17,300 MT of Ukrainian Milling Wheat from the Latest Crop (2017) (the Cargo) shipped on board the vessel "NIKA" (IMO No. 9254513) (the Vessel) for carriage from Chornomorsk, Ukraine to one Egyptian Mediterranean Port under the Bills of Lading BL Nos 1 to 26 and BL No. 61 dated on or about 22 March 2018 (Bills of Lading), and/or as lawful holders and/or indorsees of the Bills of Lading, claim against the defendants (the respondents) as carriers and/or persons being in physical possession of the cargo. The plaintiffs' claims are for:
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> (a) Damages for breach of the contract(s) of carriage contained in and/or evidenced by the Bills of Lading, and/or breach of duty, and/or negligence, and/or breach of duty as bailees, and/or wrongful interference, and/or injury to the plaintiffs' interests in the Cargo by the defendants, their servants and/or agents in and about the bailment, loading, stowage, handling, custody, care, discharge and delivery of the Cargo and the shipment and carriage thereof on board the Vessel on or around the date and for the voyage as specified in the Bills of Lading, and/or for a declaration for indemnity in respect of all loss, liability, costs and/or expenses suffered and/or incurred or which may be suffered and/or incurred by the plaintiffs as a result of the defendant's breaches as aforesaid;
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> (b) Interest;
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> (c) Costs; and
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> (d) Other relief deems fit by the Court.

[6] In summary, the appellant's claim is for misdelivery of the cargo by the respondent to unauthorised third parties without presentation of the original bills of lading which, at all material times, were in the appellant's possession.

[7] Order 70 r. 7(1) of the Rules of Court 2012 (ROC) states, "a writ by which an action *in rem* is begun shall be served on the property against which the action is brought." Put simply, it means the writ was to be served on the vessel NIKA itself, in the manner prescribed by O. 70 r. 10 of the ROC and substituted service could neither be ordered nor effected.

[8] Pursuant to O. 70 r. 7(1), the writ could only be served on the vessel "NIKA" if it comes into Malaysian waters.

[9] A writ is valid for six months from the date it was issued. This is provided for in O. 6 r. 7(1) of the ROC wherein it is stated that "a writ is valid at first instance for six months beginning from the date of its issue". Thus, having filed the writ on 17 May 2019, it is valid until 16 November 2019.

[10] Therefore, the appellant is required to serve the writ on the vessel on or before 16 November 2019.

[11] If a writ cannot be served on the vessel within its validity period of six months, the appellant can apply to the court under O. 6 r. 7(2) to extend the validity of the writ. Order 6 r. 7(2) reads as follows:

> Subject to paragraph (2A), where efforts to serve a writ on a defendant have been unsuccessful, the Court may by order extend the validity of the writ twice (in Sabah and Sarawak thrice and in admiralty actions five times), not exceeding six months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order.

[12] Order 6 r. 7(2A) reads as follows:

> An application for a renewal of writ must be made before the expiry of the writ, *ex parte* by notice of application supported by affidavit showing that efforts have been made to serve the defendant within one month from the date of the issue of the writ and that efforts have been made subsequent thereto to effect service.

[13] In *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal* [2009] 4 CLJ 329, Zaki Azmi CJ said:

> [39] I strongly believe that O. 6 r. 7(2A) RHC was introduced to prevent abuse by the plaintiffs in filing writs and sleeping on them without making efforts to serve them. This practice of inactivity is something which courts loathe. It is against the administration of justice. It creates a backlog and results in a false number of pending cases. In my opinion, courts should take serious a view of such cases. If not, they will continue to remain in the list of outstanding cases. As such, O. 6 r. 7(2A) RHC must be strictly enforced as required by the rule.

A [40] When plaintiffs apply to extend the validity of writs, courts should examine closely the affidavits filed in support of applications for extensions. Before granting an extension, courts must be satisfied that serious efforts had been made to serve. A simple and plain statement that efforts had been made to serve cannot be a sufficient ground. The affidavits must provide detailed facts as to when, where and how attempts B to serve were made. Otherwise O. 6 r. 7(2A) RHC will become a dead letter. The object of the rule will be defeated.

[14] Until now, the writ in this case remains unserved as the vessel has not been into Malaysian waters since the writ was issued in May 2019 for service to be effected. Prior to this, the appellant has made five applications to C extend the validity of the writ to which the court had granted five extensions as follows:

Extension	Application	Order	Duration
First	15.11.2019	05.12.2019	17.11.2019 - 16.05.2020
Second	06.05.2020	15.05.2020	17.05.2020 - 16.11.2020
Third	16.11.2020	16.11.2020	17.11.2020 - 16.05.2021
Fourth	05.05.2021	11.05.2021	17.05.2021 - 16.11.2021
Fifth	10.11.2021	15.11.2021	17.11.2021 - 16.05.2022

[15] By notice of application dated 13 April 2022 (encl. 46), the appellant applied under O. 6 r. 7 and/or O. 3 r. 5 and/or O. 92 r. 4 of the Rules of Court 2012 to extend the validity of the writ for a further six months from 17 May 2022.

[16] In the affidavit in support of the application, the appellant gives the reasons for not effecting service as follows:

(i) the vessel has not been into Malaysian waters for the period from 17 May 2019 to 16 May 2022 for service to be effected;

G (ii) the appellant has been constantly and diligently monitoring the movement of the vessel through the use of the services provided by Lloyd's List Intelligence and/or Marine Traffic, to see whether or not it has been into Malaysian waters, and to the best of the appellant's knowledge it has not done so; and

H (iii) as the vessel has not been into Malaysian waters in all that time, the appellant has not had any reasonable opportunity to effect service, and non-service is not from any default or lack of effort by the appellant.

[17] Before the High Court, learned counsel for the appellant submitted I that manifest injustice would be caused to the appellant if the validity of the writ is not extended due to the following reasons:

(i) the ownership of the vessel has changed hands three times:

(a) from Discover Investment Corp to Anchor Nautical SA (Anchor);

(b) thereafter, from Anchor to Bluefish Marine Corp (Bluefish); and

(c) thereafter, from Bluefish to Bao Yi Shipping Co Ltd (Bao Yi).

(ii) with the transfer of ownership, the appellant cannot issue a fresh admiralty *in rem* writ for the same claim against Bao Yi Shipping Co Ltd, who is not the party liable *in personam* for the appellant's claim.

(iii) the appellant also cannot file a fresh writ against Discover Investment Corp because any new claim would be barred by limitation;

(iv) appellant should not be penalised by a procedural rule that is primarily intended to prevent a plaintiff's lack of action and abuse; and

(v) if the writ was not renewed, the appellant would be deprived of its substantive rights through no fault of its own and would be deprived of its remedies in law. That in itself would be manifestly unjust and contrary to the administration of justice, which could never have been the intent of the five time extension limit under O. 6 r. 7(2) of the ROC 2012.

[18] In view of the express limitation of five times extension only allowed under O. 6 r. 7(2), learned counsel for the appellant urged the High Court to exercise its discretion under O. 92 r. 4 of the ROC, citing *Arab-Malaysian Credit Bhd v. Tan Seang Meng* [1995] 1 CLJ 773; [1995] 1 MLJ 525.

[19] Order 92 r. 4 of the ROC provides:

> For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[20] The facts of the case in *Arab-Malaysian Credit Bhd v. Tan Seang Meng* are as follows. The plaintiff had granted banking facilities to a company which the defendant had guaranteed repayment of. When the plaintiff could not personally serve the writ it had filed on August 1985 on the defendant, it applied and obtained a substituted service order. The defendant failed to enter an appearance. In May 1986, the plaintiff entered a default judgment against him. It was only in August 1992, under threat of bankruptcy that the defendant applied to set aside the default judgment. He succeeded in setting aside the default judgment on the ground that the substituted service was fatally flawed. As a result, the writ was deemed to have never been served on him. The plaintiff cannot re-serve the writ as its validity has long expired. The plaintiff also cannot file a fresh claim against the defendant as it is time-

barred. The plaintiff then filed eight separate applications to extend the validity of the writ. The High Court dismissed the applications. The plaintiff appealed to the Court of Appeal. In allowing the appeal, Gopal Sri Ram JCA said:

> Having addressed our minds to the plain words of O. 6 r. 7, and the decided cases in which it has been considered, we are satisfied that the High Court had ample jurisdiction to grant the plaintiff in the instant case the several extensions sought by it of its writ. Quite apart from O. 6 r. 7, there is wide power under O. 3 r. 5 conferred upon the High Court to extend time. Even the restriction of granting more than one extension of 12 months expressed in O. 6 r. 7 may, in appropriate cases, be overcome by having resort to O. 92 r. 4 (absent in the English RSC) which is jurisdictional provision, (See *Pacific Centre Sdn Bhd v. United Engineers (M) Bhd* [1984] 2 MLJ 143). Further, in a recent and yet unreported judgment of this court, reference has been made to the important principle that a of court should not be construed so as to produce unfairness or a manifest injustice (See *Sim Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Bhd*, Court of Appeal Civil Appeal No. P-02-7-94 [since reported in [1995] 1 MLJ 292]). Surely, this principle may be invoked to overcome any technical obstacles in the way of achieving substantial justice in a case where a pedantic approach to a rule of court will result in injustice." In the premises, we are satisfied that the learned judge was clearly wrong in holding that the court had no jurisdiction to make the orders it did.

[21] The learned Judicial Commissioner declined to follow *Arab-Malaysian Credit Bhd v. Tan Seang Meng* because that case deals with the old O. 6 r. 7 which does not limit the validity of a writ to be extended to five times only. Instead, the learned Judicial Commissioner preferred to rely on the following two cases:

(i) *Yomeishu Seizo Co Ltd & Ors v. Sinma Medical Products (M) Sdn Bhd* [1996] 2 BLJ 142; [1996] 2 MLJ 334; and

(ii) *Samsung Corp v. Chinese Chamber Realty Pte Ltd* [2004] 1 SLR (R) 382.

[22] In *Yomeishu Seizo Co Ltd & Ors v. Sinma Medical Products (M) Sdn Bhd*, VC George J said:

> The court has always had an inherent jurisdiction to regulate its own proceedings. Order 92 r. 4 of the Rules of the High Court 1980 recognises this to be the position. However, that is not to mean that the judge may ignore express rules of court and make his own rules of practice and procedure inconsistent with written rules and time honoured practices. There is no doubt that from time to time, established rules and practices become outdated. For instance, there are rules and practices that make for extended trials. Some of these rules and practices could perhaps be done away with or at least streamlined. New rules could be brought in. However, it is not open to individual judges or even for the conference of judges to take it upon himself or itself to do away with or streamline

> or adopt innovative procedures. However well intentioned, that sort of thing, if permitted, could lead to a form of anarchy. If changes are called for, what has to be done is to have the rules committee-the members of which are carefully selected from the Bench and from members of the Bar and includes the Attorney General or his representative and which is headed by none other than the Chief Justice-give due consideration to the new ideas and have the rules duly amended. And until such amendments are effected, the old rules and practices cannot be ignored and new procedures may not be implemented. However, where there is a *lacuna* in the rules and practice, then and only then, may the aforesaid inherent jurisdiction be invoked.

[23] In *Samsung Corp v. Chinese Chamber Realty Pte Ltd*, Chao Hick Tin JA said:

> We endorse the views of the judge that generally where the Rules of Court have expressly provided what can or cannot be done in a certain circumstance, it is not for the court to override the clear provision in exercise of its inherent powers. No court should arrogate unto itself a power to act contrary to the Rules. The rule making powers are conferred upon the Rules Committee. The court should not usurp the powers and functions of the Rules Committee.

The High Court's Decision

[24] After considering the law and the cases cited by counsel for the appellant, the learned Judicial Commissioner dismissed the appellant's application to extend the validity of the writ for the sixth time on the following grounds:

(i) that O. 6 r. 7(2) of the ROC is a specific provision to cater for renewal of admiralty writ *in rem* and it only allows a maximum of five renewals.

(ii) that O. 92 r. 4 of the ROC is not applicable as there was no *lacuna* in the rules to necessitate the court to exercise its inherent jurisdiction.

(iii) that the Rules Committee had seen fit to permit only five times of extensions of writs *in rem*.

(iv) that the Rules Committee had not seen fit to amend the Rules of Court notwithstanding developments in the procedural rules of other jurisdictions.

(v) that the court should not usurp the power and function of the Rules Committee.

The Appellant's Submission

[25] The appellant submits that the High Court erred in holding that:

(i) there was no *lacuna* in the law by reason of the "cap" provided in O. 6 r. 7(2) of the ROC;

A (ii) Order 92 r. 4 of the ROC is not applicable to overcome the limit imposed under O. 6 r. 7(2) of the ROC;

(iii) the limit of five times renewal under O. 6 r. 7(2) is absolute irrespective of the fact that in this case it is impossible to effect service; and

B (iv) the sixth extension sought by the appellant would have the effect of the High Court usurping the powers and functions of the Rules Committee.

Our Decision

[26] We disagree with the appellant's submission. We find the learned Judicial Commissioner had applied his mind correctly to O. 6 r. 7(2) of the C ROC which limits renewal of a writ in admiralty action to five times only and therefore the court is not allowed to grant the sixth renewal.

[27] In view of the specific provision with regard to the number of renewals allowed under O. 6 r. 7(2) of the ROC, we also agree with the D learned Judicial Commissioner that there is no *lacuna* in the provision of the rules with regard to the renewal of the writ in admiralty action.

[28] We find the learned Judicial Commissioner did not err in refusing to apply O. 92 r. 4 of the ROC, as there is a specific provision on the renewal of the writ in admiralty action under O. 6 r. 7(2). Added to that, we find that E the learned Judicial Commissioner was not plainly wrong on the interpretation of O. 6 r. 7(2) of the ROC on the ground that if the court grants the sixth renewal, when will the renewal stop if the vessel still did not come into Malaysian water four years from now. Does it mean that the court should continue granting extensions until the vessel comes into Malaysian F water? If these were to happen, it would defeat the purpose of having O. 6 r. 7(2) of the ROC.

[29] For the aforesaid reasons, we find the learned Judicial Commissioner had not erred in his decision to adhere to O. 6 r. 7(2) of the ROC. The appeal is therefore dismissed.

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